Office-Supreme Court, U.S.
FILED
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# 80-1259

No. 80-

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

JOHN VON BARTA, III,

*Petitioner,*

*v.*

UNITED STATES OF AMERICA,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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## Questions Presented

1. Whether the Court of Appeals has jurisdiction, pursuant to U.S.C. §3731, to review the "dismissal" of an indictment engineered by the government, after an initial denial of a defense motion to dismiss, reacting to the warning of the District Court that the prosecution's evidence might be held insufficient at the close of its case?

2. Whether the scope of the mail and wire fraud statutes, 18 U.S.C. §§1341 and 1343, be so broadened to reach alleged non-disclosures by a private employee said to thereby deprive his employer of only its intangible right to loyal and faithful services, and nothing more?

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IN THE

# Supreme Court of the United States

OCTOBER TERM 1980

JOHN VON BARTA, III,

*Petitioner,*

—*v*—

UNITED STATES OF AMERICA,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner John Von Barta, III respectfully petitions that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on November 25, 1980, reversing the District Court order and reinstating the indictment.

### Opinion Below

The opinion of the Court of Appeals, reversing the District Court order and reinstating the indictment, which is unofficially reported, slip. op. at 361, appears at pages 1a to 13a in the Appendix to this petition.

### Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was dated and entered on November 25, 1980 (A. 28a). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

## Statutes Involved

Title 18, United States Code §1341

"§1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

Title 18, United States Code §1343

"§1343. Fraud by wire, radio, or television

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

Title 18, United States Code §3731

"§3731. Appeal by United States

In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

* * * "

## Statement of the Case

### A. Proceedings in the Lower Courts

Indictment 79 Cr. 774, in fifteen counts, was filed in the United States District Court for the Southern District of New York on November 1, 1979 and charged the defendant with seven counts of mail fraud, in violation of 18 U.S.C. §1341, seven counts of wire fraud, 18 U.S.C. §1343, and one count of conspiracy, 18 U.S.C. §371. In essence, the scheme to defraud alleged in the indictment is premised solely on an asserted breach of a fiduciary duty owed to a private employer, said to have occurred by virtue of Von Barta's non-disclosure of his interest in Piwacket Corporation, a customer of his employer.

The defendant moved to dismiss the indictment on the ground that the indictment on its face did not allege an artifice or scheme to defraud within the meaning of the mail and wire fraud statutes. District Court Judge Brieant, in initially denying the motion, ruled that the indictment was valid on its face and would support a theory that Von Barta intended a tangible injury to his employer. However, Judge Brieant added that the government's theory based on breach of fiduciary duty alone would not ultimately be sustained, stating that:

"Absent controlling precedent in this Circuit, this Court declines to accept the Government's theory and extend the wide mouthed purse seine of 'mail fraud' to include mere

breaches of a fiduciary duty of honesty and loyalty by an employee, coupled with material misstatements of fact or non-disclosure."

(A. 25a).

The government, presumably displeased with the District Court's statement of problems in the government's evidentiary theory, subsequently moved for "reargument, clarification and amendment" of the District Court's decision, despite the fact that the government cited no overlooked, controlling decisions and pointed to no matters not previously considered by the Court. In opposition, the petitioner argued that the government was attempting to convert a non-appealable statement of the Court into an appealable order, and urged his readiness for trial.

As oral argument on the government's motion, the Court, over the petitioner-defendant's objection, stated that although the ". . . pleadings are perfectly good, [and the] indictment is good on its face . . .", he would dismiss the indictment if the government wished to proceed only on the theory that the defendant had breached his fiduciary duty to his employer. The Court also indicated that if the government proceeded to trial only on that theory, it would be inclined to grant the defendant a Judgment of Acquittal at the close of the government's case pursuant to Fed. R. Crim. P. 29(a). (A. 29a-33a).

The government acting on the District Court's option, essentially requested that the indictment be dismissed. The petitioner continued to press his objection to this unusual and apparently unauthorized procedure, but the District Court nevertheless dismissed the indictment on May 12, 1980.

The government, having maneuvered the dismissal of the indictment, filed its appeal to the Court of Appeals for the Second Circuit, which reversed the order dismissing the indictment on November 25, 1980. (A. 28a).

**B. The Alleged Fraud**

The facts set forth herein are premised on the indictment, grand jury testimony and the government's bill of particulars. These facts were asserted below with the acquiescence of the government and are essentially undisputed.

* * *

From 1976 to shortly before the filing of the indictment in 1979, the petitioner was engaged as a salesman and trader in the purchase and sale of United States government bonds and government agency bonds at Malon S. Andrus, Inc. ("Andrus"), a small financial firm in New York City. As part of his employment at Andrus the petitioner supervised transactions with Blyth, Eastman Dillon & Co., Inc. ("Blyth"), a large brokerage firm. In the course of the dealings between the two firms, the petitioner became acquainted with co-conspirator William Harty, a bond salesman at Blyth.

In Spring of 1978, Harty and Von Barta decided to trade personally through Piwacket Corporation ("Piwacket"), which was incorporated by Harty in New York in July, 1978. Von Barta, in the exercise of his authority at Andrus, arranged for Piwacket to open an account. In form as well as in substance, Piwacket was no different from any other customer of Andrus. Andrus did not have any rules prohibiting an employee, such as Von Barta, from having an interest in an account nor was there any requirement that he disclose such an interest to his employer.

From August, 1978 to July, 1979, Piwacket, through Andrus, engaged in three forms of trades: a) straight purchases and sales of government bonds and government agency bonds; b) straight repurchase agreements and reverse repurchase agreements of government bonds and government agency bonds, which are essentially collateralized loans of money or securities; and c) arbitrages, which are primarily hedged transactions whereby a repurchase and reverse repurchase of government bonds and government agency bonds are simultaneously initiated by Piwacket. All such transactions were perfectly routine and normal financial transactions.

The petitioner and Harty engaged in these transactions in the same exact manner as any other corporate customer of Andrus. As such, the creditworthiness of Piwacket and identity of the principals were as immaterial to these transactions as they were to any corporate customer with limited liability. In the narrow type of transactions involved in this case, the bonds themselves have intrinsic value and thus the capital of any corporate customer becomes immaterial.

Piwacket's initial capital of $10,000 was sufficient to finance the first transactions, and the profits thereby generated financed the later ones. Piwacket was openly recorded as an account on the books of Andrus and was treated in all respects as a normal account. The transactions were handled in the same open, unconcealed manner as all other accounts. Piwacket earned its profits—and Andrus its commissions—in a perfectly proper manner.

In December, 1978, Blyth changed the rates of interest on its arbitrages, which severely affected the profitability of Piwacket's market position on many of its transactions. By June, 1979, Piwacket was forced to cease entering into new transactions. Andrus and Blyth decided on their own to liquidate the Piwacket account, thus causing a loss of $2,000,000.

## Reasons for Granting the Writ

Each of the issues presented by the petitioner is of major importance to the federal criminal process because each involves an unwarranted and unprecedented expansion of the prosecution's powers. The issue concerning the appealability of the District Court's order focuses on the unfair and disingenuous utilization of procedural devices to convert an otherwise non-appealable, factual finding of insufficiency into an appealable order "dismissing" the indictment. The second issue, involving the expansion of the frequently used mail and wire fraud statutes to include brand new and unprecedented theories of fraud, focuses on the ability of the government without notice to classify previously acceptable conduct as a crime. This Court should review both issues.

## 1. The Court of Appeals Was Without Jurisdiction to Entertain an Appeal From the District Court's Order

### A. The Government's Motion to Reargue Constituted A Motion to Dismiss Under Fed. R. Crim. P. 48(a)

The defendant's motion to dismiss pursuant to Fed. R. Crim. P. 12(b) was predicated on the asserted failure of the indictment to set forth a scheme or artifice to defraud within the purview of the mail and wire fraud statutes. The District Court, in denying the motion, plainly ruled that the indictment was valid on its face and directed a hearing to fix a trial date. At that hearing, the defendant urged that he was ready for trial and opposed the government's formal motion, labeled as one for "reargument."

The government's motion was prompted by language in District Judge Brieant's opinion indicating that he would grant the defendant a Judgment of Acquittal pursuant to Fed. R. Crim. P. 29(a) if the government failed to prove a traditional fraud. The Court then invited the government's motion which followed, by stating:

> "Should [the government] indicate that it does not intend to go to the trial jury on tha. analysis, or cannot prove a *prima facie* case on that basis, this Court will grant a pretrial motion to dismiss if so requested."

(A. 25a-26a).

Despite its label, the government's motion was clearly its own to dismiss the indictment, the authority for which rests under Fed. R. Crim. P. 48(a). A dismissal pursuant to this rule is not a final order with prejudice *United States v. Ortega—Alvarez*, 506 F.2d 455 (2d Cir. 1974), *cert. denied*, 421 U.S. 910 (1975), and is therefore non-appealable. *Cf. Parr v. United States*, 351 U.S. 513, 516 (1956). Labeling the government's motion as one for reargument simply did not alter its sub-

stance. The government demonstrated no basis for reargument: it presented absolutely no facts or controlling decisions that it claimed the District Court overlooked, but essentially resubmitted the identical argument that already had been rejected by the District Court.

In sum, permitting the government to force a dismissal of its own indictment permits it to obtain an impermissible advisory opinion over the objection of a defendant. Such procedural machinations go beyond the letter and spirit of 18 U.S.C. §3731, permitting government appeals in appropriate cases.

**B. Additionally, the District Court's Ruling Effectively Constituted A Factual Finding That the Evidence Offered by the Government Was Insufficient to Sustain A Conviction and As Such is Non-appealable**

The interest in finality of acquittals has been described as ". . . . the most fundamental rule in the history of double jeopardy jurisprudence . . ." *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977). In accordance with this principle, Congress has precluded the prosecution from seeking review of an acquittal. 18 U.S.C. §3731.

Because District Judge Brieant ruled that the indictment was valid on its face, the resulting "dismissal"—even if not requested by the government by its motion to "reargue"—constituted an acquittal which cannot be appealed.

As this Court stated:

> ". . . a defendant is acquitted . . . when 'the ruling of the judge, whatever its label, actually represents a resolution [in the defendant's favor], correct or not, of some or all of the factual elements of the offense charged.' "

*United States v. Scott*, 437 U.S. 82, 97, *on remand*, 579 F.2d 1013 (6th Cir. 1978), *cert. denied*, 440 U.S. 929 (1979).

The Second Circuit's holding that the government's appeal was within its jurisdiction is in direct conflict with the principles enunciated in this Court's decision in *Finch v. United States,* 433 U.S. 676, *on remand appeal dismissed,* 558 F.2d 555 (1977).

Technical jeopardy, normally attending the commencement of a trial, need not attach in order to support a determination that a court's ruling was indeed an acquittal on the merits, rather than a dismissal. In *Finch, supra,* the defendant moved to dismiss the information filed against him. The motion was denied by the District Court on the ground that the information was sufficient on its face. Subsequently, the parties filed additional memoranda of law and an agreed statement of facts, resulting in the Court reversing itself and dismissing the information. *United States v. Finch,* 395 F. Supp. 205, 207 (D. Mont. 1975). The Ninth Circuit permitted an appeal by the government, 548 F.2d 822 (9th Cir. 1977), but this Court reversed, holding that the District Court's dismissal itself constituted the attachment of jeopardy and:

> "[b]ecause the dismissal was granted prior to any declaration of guilt or innocence, 'on the ground, correct or not, that the defendant simply cannot be convicted of the offense charged,' [citation omitted] . . . the Government's appeal was barred by the Double Jeopardy Clause."

433 U.S. at 677.

Here, as in *Finch,* the facts were asserted by counsel for both sides throughout all of the proceedings below without essential dispute, clearly resulting in a decision which went beyond the face of the indictment. Ultimately, the District Court's dismissal of the indictment upon the government's motion to reargue was based upon the government's concession that it possessed insufficient facts to support a conviction under the Court's interpretation of the mail and wire fraud statutes. As such, the resulting dismissal constitutes an acquittal, which cannot be appealed by the government. *United States v. Martin Linen Supply Co., supra; Fong Foo v. United States,* 369 U.S. 141 (1962). In the end, Judge Brieant ruled, as did the District Judge in *Finch,* that on

the basis of the facts as proferred, the defendant "simply cannot be convicted of the offense charged." *Finch, supra,* 433 U.S. at 677. Such a ruling, going beyond the face of the indictment and relating to the guilt or innocence of the defendant, is, under these circumstances, a non-appealable acquittal.

* * *

## 2. An Allegation of Breach of A "Fiduciary Duty" of Honesty, Loyalty and Faithful Services by A Private Employee to His Private Employer, Without More, is Insufficient to Constitute Mail and Wire Fraud

The case at bar is an example of a dangerous trend toward expanding the existing language of the mail and wire fraud statutes without Congressional intervention to fact situations, which although not new, have never before been held to be within the purview of the statute.

A fundamental precept of our system of justice is the constitutional requirement of definiteness: a criminal statute must "give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden . . ." *United States v. Harriss,* 347 U.S. 612, 617 (1954); *See also, Dunn v. United States,* 442 U.S. 100, 112 (1979); *Bouie v. City of Columbia,* 378 U.S. 347 (1964). If the opinion below is allowed to stand, every employee will be forced to speculate at the peril of indictment whether his conduct is prohibited by an ever-expanding definition of fraud. Every employee must stand in fear that, as in this case, a disgruntled employer, displeased in retrospect with the activity or performance of an employee, will cry criminal fraud by claiming a breach of fiduciary duty.

The facts in this case are not uncommon to most employee-employer relationships. An employee's "fiduciary duty" is seldom clearly defined and failure to disclose some fact, known only to that employee, and later claimed by the employer to be material to the employer's business, can all too easily under the Second Circuit's interpretation, bring that employee within the

"wide mouthed purse seine" of mail fraud. Yet, prior to this case there was no controlling authority from either the circuit courts or this Court which would have given notice to employees such as Von Barta that non-disclosure to their employers of the type of information "concealed" in this case—especially absent an employment agreement or objectively-known rule—might invite an indictment.

Absent some inherently corrupt conduct—such as the taking of kickbacks and other forms of commercial bribery, or such as the unauthorized use of confidential information—no Court of Appeals had ever before ruled that a private employee may be accused of mail fraud for simply concealing information from his employer, thereby affecting the employer's intangible right to honesty from his employees. Every prior case sustaining fraud contained some element of corruption lacking here. *See, e.g., United States v. Bohonus,* 628 F.2d 1167 (9th Cir. 1980) (kickbacks); *United States v. Reece,* 614 F.2d 1259 (10th Cir. 1980) (kickbacks); *United States v. Hasenstab,* 575 F.2d 1035 (2d Cir.), *cert. denied,* 439 U.S. 827 (1978) (kickbacks); *United States v. Corey,* 566 F.2d 429 (2d Cir. 1977) (kickbacks); *United States v. Bryza,* 522 F.2d 414 (7th Cir. 1975), *cert. denied,* 426 U.S. 912 (1976) (kickbacks); *Post v. United States,* 407 F.2d 319 (D.C. Cir. 1968), *cert. denied,* 393 U.S. 1092 (1969) (fiduciary self-dealing); *United States v. Groves,* 122 F.2d 87 (2d Cir.), *cert. denied,* 314 U.S. 670 (1941) and *United States v. Buckner,* 108 F.2d 921 (2d Cir.), *cert. denied,* 309 U.S. 669 (1940) (both involving misusing inside information essentially belonging to their employers); *United States v. Brodbeck,* 430 F. Supp. 1056 (E.D. Wisc. 1977) (corporate self-dealing); *United States v. Dorfman,* 335 F. Supp. 675 (S.D.N.Y. 1971), *affirmed,* 470 F.2d 246 (2d Cir. 1972), *cert. denied,* 411 U.S. 923 (1973) (pension fund kickback); *United States v. Hoffa,* 205 F. Supp. 710 (S.D. Fla.), *cert. denied sub nom. Hoffa v. Lieb,* 371 U.S. 892 (1962) (defrauding labor associations). By ignoring this element of corruption, this case stands alone in stretching the parameter of the mail and wire fraud statutes beyond the boundaries of prior precedents.

The prosecution of the mail fraud statutes were never intended to be without limitation and unrestricted. The judiciary has in the past limited attempted prosecutorial leaps beyond traditional notions of fraud. *See, e.g., United States v. Dixon,* 536 F.2d 1388, 1400-01 (2d Cir. 1976); *United States v. Edwards,* 458 F.2d 875, 880 (5th Cir.), *cert. denied sub nom. Huie v. United States,* 409 U.S. 891 (1972); *United States v. Kelem,* 416 F.2d 346, 347 (9th Cir. 1969), *cert. denied,* 397 U.S. 952 (1970). Thus, it has been held that the mere nondisclosure of a business interest or the receipt of a secret profit, standing alone, is not sufficient to sustain a charge of fraud. *United States v. George,* 477 F.2d 508, 512 (7th Cir.), *cert. denied sub nom. Greensphan v. United States,* 414 U.S. 827 (1973) ("We need not accept the Government's far-ranging argument that any time an agent secretly profits from his agency he has committed criminal fraud. Not every breach of fiduciary duty works a criminal fraud.") Moreover, dishonest, untoward or immoral conduct by itself is also insufficient. *See, e.g., United States v. Rabbitt,* 583 F.2d 1014, 1024 (8th Cir. 1978), *cert. denied,* 439 U.S. 1116 (1979); *United States v. McDonald,* 576 F.2d 1350, 1359 (9th Cir.), *cert. denied sub nom. Stewart v. United States,* 439 U.S. 830 (1978) (an unsavory, fly-by-night scheme is insufficient); *United States v. McNeive,* 536 F.2d 1245, 1252 (8th Cir. 1976) ("avariciousness" though uncondoned, is insufficient); *United States v. Regent Office Supply Co.,* 421 F.2d 1174, 1182 (2d Cir. 1970) (untrue statement made to induce a customer to speak with an agent held insufficient); *Epstein v. United States,* 174 F.2d 754, 765-68 (6th Cir. 1949) (non-disclosure of financial interests by employees in suppliers furnishing goods to their employer at current market prices or less not mail fraud). The facts of this case fall clearly within the purview of these holdings.

The prosecution of cases on the theory advanced by the prosecution herein tends to regulate relations between private employers and employees when there is no clear social need to do so. The result is the over-criminalization of essentially private disputes between employers and employees which certainly can be resolved by termination of employment or civil suit. This is

especially true when, as here, the asserted breach is premised on the concealment of information which only with hindsight is claimed to have been important. Criminal prosecution under such circumstances tends to result in the use of a sledgehammer to swat a fly, and should not be permitted.

The Second Circuit's recent opinion is in conflict with the other Courts of Appeals over the principles embodied by the spirit of the mail fraud statute. Consequently this case is most appropriate for the establishment of clear guidelines by this Court to forestall the future possibility that an overzealous prosecutor may utilize the mail and wire fraud statutes to raise civil and disciplinary matters to the level of criminality.

## CONCLUSION

**For the foregoing reasons, a writ of certiorari should issue to review the judgment of the Court of Appeals for the Second Circuit.**

Respectfully submitted,

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January, 1981

# APPENDIX

## Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 233—September Term, 1980

(Argued October 27, 1980 Decided November 25, 1980)

Docket No. 80-1233

UNITED STATES OF AMERICA,

*Appellant,*

*against*

JOHN VON BARTA,

*Defendant-Appellee.*

Before:

KAUFMAN, KEARSE, and BRIGHT*,

*Circuit Judges.*

Appeal from an order of the United States District Court for the Southern District of New York, Charles L. Brieant, Jr., *District Judge,* dismissing appellee's indictment for failure to allege a scheme or artifice to defraud within the purview of the mail and wire fraud statutes.

*Of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

Reversed and remanded.

JOHN S. MARTIN, JR., United States Attorney for the Southern District of New York (Gerard E. Lynch, Gregory L. Diskant, Assistant United States Attorneys, of counsel), *for Appellant.*

ELKAN ABRAMOWITZ (Gilda I. Mariani, of counsel), *for Defendant-Appellee.*

KAUFMAN, *Circuit Judge:*

The centuries-long trend toward greater sophistication in the criminal law has increasingly blurred the line between criminal and noncriminal misbehavior. While defining lawless conduct is primarily a legislative function, courts have mitigated the severity of penal sanctions by construing ambiguous statutes against the Government. This doctrine of strict construction, which grew out of the emerging humanitarianism of seventeenth century England,[1] has long been a tenet of American jurisprudence. *See, e.g., United States v. Wiltberger,* 18 U.S. (5 Wheat.) 76 (1820). But this principle is just the start of the difficult process of statutory interpretation, for in some areas Congress has purposely cast wide the net of the criminal law.

In the instant case, we are asked to construe two seemingly limitless provisions, the mail[2] and wire[3] fraud statutes, in the

[1]Hall, *Strict or Liberal Construction of Penal Statutes,* 48 Harv. L. Rev. 748, 750 (1935).

[2]18 U.S.C. §1341 (1976) provides in pertinent part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, . . . for the purpose of executing such scheme or artifice or attempting to do so, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be de-

*(Footnote continued on following page)*

context of the employer-employee relationship. The Government urges us to hold that these statutes are violated whenever an employee, acting to further a scheme for pecuniary gain, intentionally breaches a fiduciary duty of honesty or loyalty he owes his employer. The defendant decries this "overcriminalization" of the employment relationship, and asks us to declare his alleged conduct exempt from criminal sanction. While we reject the sweeping theory advanced by the Government, we find that the mail and wire fraud statutes do reach the conduct with which the defendant is charged. Accordingly, we reverse the district court's dismissal of the indictment.

## I.

A description of the procedural posture of this case is essential to our analysis of the merits of the Government's appeal. On November 1, 1979, John Von Barta was indicted on seven counts of mail fraud, seven counts of wire fraud, and one count of conspiracy to commit those offenses, in violation of 18 U.S.C. §§ 1341, 1343, 2, and 371 (1976). Von Barta moved to dismiss the indictment, contending it failed to charge a scheme or artifice to defraud, a necessary element of all fifteen counts. Judge Brieant initially denied Von Barta's motion, holding the indictment valid on its face. Upon reconsideration, however, he dismissed the charges. The Government then filed this appeal.

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*(Footnote continued from previous page)*

livered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

[3]18 U.S.C. §1343 (1976) provides:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

In reviewing the district court's dismissal of the indictment, we take as true all of its allegations, *see Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337, 343 n. 16 (1952); *United States v. Bohonus*, No. 79-1449 (9th Cir. Apr. 18, 1980), as amplified by additional documents submitted by the Government, which Judge Brieant accepted in lieu of a formal bill of particulars. The defendant's contrary assertions of fact will not be considered. *See Las Vegas Merchant Plumbers Association v. United States*, 210 F.2d 732, 741 (9th Cir.), *cert. denied*, 348 U.S. 817 (1954).

From 1976, until the indictment against him was filed in 1979, Von Barta was employed as a salesman and trader of government bonds at Malon S. Andrus, Inc. ("Andrus"), a small securities firm in New York City. When Von Barta was hired, he was admonished "never to jeopardize the firm's banking relationships and always to advise Mr. Andrus if the firm's repurchase agreements 'were in trouble.' "[4] As this warning indicates, Von Barta enjoyed an especially powerful and trusted position at Andrus. He had considerable discretion to open new customer accounts, knowing his decisions in that regard would not be reexamined by another member of the firm.

Von Barta conducted many of his trades with William Harty,[5] a salesman in the government securities department at Blyth Eastman Dillon & Co. ("Blyth"), a large New York brokerage firm. In or about July 1978, Harty formed the Piwacket Corp. ("Piwacket"), to which he and Von Barta each contributed $5,000 as their capital investment. They decided to use Piwacket as their vehicle for trading in government bonds, and agreed to share equally in any profits made by their corporation. Von Barta then opened an account for Piwacket with Andrus, without telling Mr. Andrus of Piwacket's meagre capi-

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[4]Letter dated February 7, 1980 from Assistant United States Attorney Kaplan to Elkan Abramowitz, counsel for the defendant. Judge Brieant treated this letter as a bill of particulars.

[5]Harty was named in the indictment returned against Von Barta as an unindicted "co-schemer." He was also charged in an information similar to the indictment filed against Von Barta, and pled guilty to those charges.

talization or of his involvement with the firm. Piwacket became one of Andrus's most active accounts, generating substantial commissions for both Andrus and Von Barta. Piwacket ultimately speculated in government bonds worth more than $50 million, and incurred liabilities vastly in excess of the combined ability of Andrus and Piwacket to secure Piwacket's creditors against loss. The volume of Piwacket's trading attracted the attention of Andrus and Blyth, but Von Barta continued to conceal his involvement, falsely telling Mr. Andrus that Piwacket was an established Long Island arbitrageur and misrepresenting to Blyth that Harty was Piwacket's sole principal.

At first, Piwacket's trades were very successful generating profits of nearly $200,000. Later, however, the bond market weakened. When Von Barta indicated that Piwacket could not cover its losses, Andrus terminated the Piwacket account. Piwackets' resultant insolvency forced Andrus and Blyth to bear a $2 million loss.

The Government alleges that by trading through Piwacket, Von Barta speculated in the government bond market using the fraudulently obtained credit of Blyth and Andrus. It charges further that by limiting Piwacket's liability to $10,000 (the amount of the capital investment), Von Barta attempted to shield himself from the risk accompanying his speculative transactions. In effect, the Government claims, Von Barta shifted the risk from himself to Andrus. If his trades were successful, he reaped the profit; if they failed, Andrus bore the loss. Finally, the Government charges that Von Barta concealed material information from Andrus. According to the Government, Andrus never would have allowed Von Barta to open or to continue trading in the Piwacket account had it known Piwacket was undercapitalized, that Von Barta was involved with the firm, or that neither Andrus nor Piwacket had sufficient assets to cover Piwacket's losses.

In setting out its theory of the indictment, the Government has repeatedly refused to rely on allegations that Von Barta intended to defraud Andrus of any tangible interest. Rather, the

Government charges that "Von Barta, by abusing his fiduciary position as an employee of Andrus, and concealing material information, defrauded Andrus of its right to his honest and faithful services, as well as of its right to decide what business risks to bear with all the facts before it."[6] Thus, we are asked to decide whether Von Barta's alleged scheme to defraud his employer of only these intangible interests violates the mail and wire fraud statutes.[7]

## II.

As an initial matter, we must consider Von Barta's challenge to our jurisdiction to hear this case, a question that arises because the district court adopted an unusual procedure in construing the indictment.[8] Von Barta contends that an appeal does not lie because, he says, the Double Jeopardy Clause bars his further prosecution. Relying on *Finch v. United States*, 433 U.S. 676 (1977) (per curiam), he argues that since Judge Brieant went beyond the face of the indictment in granting the motion to dismiss, the order of dismissal constitutes a non-appealable acquittal. The Government disputes Von Barta's characterization of the district court's order and asserts jurisdiction under 18 U.S.C. §3731 (1976).

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[6]Government's brief at 5.

[7]We note that Von Barta strenuously disputes the Government's characterization of the facts. In particular, he claims he was not speculating in the government bond market, that there was nothing unusual about employees at Andrus trading on their own accounts, and that the details of Piwacket's financial position and the volume of its trading were not material to Andrus. Of course, our exegesis of the mail and wire fraud statutes is tied to the Government's allegations. We express no opinion concerning the proper application of those provisions to the factual setting Von Barta describes.

[8]As previously discussed, Judge Brieant initially denied Von Barta's motion to dismiss, holding that the defendant could be convicted under the indictment "[i]f proof at trial shows that defendant, alone or with Harty, intentionally induced Blyth or Andrus to part with money or tangible property, . . . and did so by means of active concealment or false statements in furtherance of a scheme or artifice to defraud, within

*(Footnote continued on following page)*

Section 3731 provides, in relevant part:

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

The provisions of this section, which are to be liberally construed, are designed to "remove all statutory barriers to Government appeals and to allow appeals whenever the Constitution would permit." *United States v. Wilson*, 420 U.S. 332, 337 (1975). Section 3731 thus abrogates the strict rules which once practically barred all criminal appeals by the United States and directs our attention to the policies underlying the Double Jeopardy Clause. In particular, we must decide whether jeopardy had attached when Judge Brieant dismissed Von Barta's indictment, for it is a "fundamental principle that an accused must suffer jeopardy before he can suffer double jeopardy." *Serfass v. United States*, 420 U.S. 377, 393 (1975). *See also United States v. Jorn*, 400 U.S. 470, 480 (1971). In *United States v. Velazquez*, 490 F.2d 29 (2d Cir. 1973), *cert. denied*, 421 U.S. 946 (1975), one of the first cases in this Circuit to consider this question, we held that jeopardy had no attached when the dis-

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the statute, and some pecuniary loss to the firms or pecuniary gain to Harty or defendant was sought or intended thereby." *United States v. Von Barta*, No. 79 Cr. 774, slip op. at 9 (S.D.N.Y. Apr. 21, 1980). In so holding, Judge Brieant considered the indictment on its face "as amplified and limited by letters from the Government, oral representations made in open court, and silence or partial silence of the Government in response to defendant's submissions." *Id.* at 6. He emphasized, however, that no proof had been taken.

Realizing that Judge Brieant had misunderstood its theory of indictment, the Government moved for reargument. Once properly apprised of the Government's "intangible interest" theory, Judge Brieant granted Von Barta's motion to dismiss.

This recitation of the proceedings in the lower court suffices to refute the defendant's claim that the Government is estopped to appeal from the order of dismissal. Contrary to Von Barta's assertion, Judge Brieant did not grant the Government's motion, he granted Von Barta's.

trict court, relying on motion papers submitted prior to trial, dismissed an indictment. In *Serfass v. United States,* however, the Supreme Court rejected *Velazquez*'s premise that the normal rules governing the attachment of jeopardy are only presumptions.[9] While eschewing a mechanical approach, the Court stated that jeopardy does not attach until the accused has been forced to risk a determination of guilt. *Id.* at 391-92. Consequently, the Court upheld the Government's right to appeal the dismissal of Serfass's indictment, although the district judge had found facts before ruling on the motion to dismiss.

In this case, Judge Brieant did not resolve any disputed issues of fact in granting Von Barta's motion to dismiss the indictment. He simply used the materials available to him to shed light on the Government's theory of the case. Moreover, since Judge Brieant had no power to convict Von Barta at this preliminary stage of the proceedings, the defendant has not yet risked a determination of guilt. Accordingly, the Double Jeopardy Clause does not bar further prosecution, and the Government's appeal under § 3731 is proper.[10]

## III.

We now turn to the merits of the Government's argument. The prosecution contends that the phrase "scheme or artifice to defraud," which appears in both the mail and wire fraud statutes,[11]

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[9]In a jury trial, jeopardy usually attaches when the jury is empanelled and sworn, *Serfass v. United States,* 420 U.S. 377, 388 (1975), but in a trial to the court, jeopardy normally attaches when the court begins to hear evidence, *id.*

[10]*Finch v. United States,* 433 U.S. 676 (1977) (per curiam), on which Von Barta relies, does not compel a different result. Because Finch was charged with a petty offense, he had no constitutional right to a jury trial. He was thus placed in jeopardy when the court began to hear evidence, *see* note 9 *supra,* which occurred *before* the information filed against him was dismissed.

[11]Since the courts have uniformly given this language the same construction in applying both the mail and wire fraud statutes, *see, e.g., United States v. Louderman,* 576 F.2d 1383, 1387 n.3 (9th Cir.), *cert. denied,* 439 U.S. 896 (1978), we will refer only to the mail fraud statute in the following discussion.

encompasses a fraudulent scheme to deprive an employer of his intangible right to an employee's honest and faithful services. Before attempting to determine the proper scope of these statutes, however, we note that the courts have taken conflicting approaches to their interpretation. Many have construed the mail fraud statute expansively.[12] Others, voicing the concerns underlying the doctrine of strict construction, have taken a narrower view.[13] Several courts have attempted to reconcile these disparate approaches by seeking to discover how far Congress meant to extend § 1341 and by strictly confining the statute within its intended bounds. *See United States v. Bohonus, supra; United States v. McNeive,* 536 F.2d 1245, 1247 n. 3 (8th Cir. 1976). This attempted accommodation is unavailing, however. The sparse legislative history accompanying § 1341 and its predecessor statutes reveals only one clearly articulated purpose: to prevent the use of the mails in furtherance of fraudulent enterprises. *See United States v. Mandel,* 591 F.2d 1347, 1358 (4th Cir.), *aff'd per curiam in relevant part,* 602 F.2d 653 (1979) (en banc), *cert. denied,* 100 S.Ct. 1647 (1980); *Badders v. United States,* 240 U.S. 391, 393 (1916) (interpreting predecessor statute); *Durland v. United States,* 161 U.S. 306, 314 (1896) (interpreting predecessor statute). Unfortunately, this purpose affords us little help in defining "scheme or artifice to defraud."

The absence of legislative guidance has left the courts with

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[12]An oft-quoted formulation is that found in *Gregory v. United States,* 253 F.2d 104, 109 (5th Cir. 1958): "The aspect of the scheme to 'defraud' is measured by [a] nontechnical standard. It is a reflection of moral uprightness, of fundamental honesty, fair play and right dealing in the general business life of members of society." *Accord, United States v. States,* 488 F. 2d 761, 764 (8th Cir. 1973), *cert. denied,* 417 U.S. 909 and 417 U.S. 950 (1974); *United States v. Buckner,* 108 F.2d 921, 926 (2d Cir.), *cert. denied,* 309 U.S. 669 (1940).

[13]For example, in applying §1341 in the field of domestic relations, the Fifth Circuit stated: "Statutes like the federal mail fraud statute involved here must be strictly construed in order to avoid extension beyond the limits intended by Congress." *United States v. Edwards,* 458 F.2d 875, 880 (5th Cir.), *cert. denied,* 409 U.S. 891 (1972). *Accord, United States v. Louderman, supra,* 576 F.2d at 1388; *United States v. Kelem,* 416 F.2d 346, 347 (9th Cir. 1969), *cert. denied,* 397 U.S. 952 (1970).

broad discretion to apply the mail fraud statute to the myriad fraudulent schemes devised by unscrupulous entrepreneurs. This process of case-by-case development has produced several limiting principles.[14] But not all the rules the courts have fashioned narrow the statute's scope. For example, it is now generally accepted that the object of the fraudulent scheme need not be the deprivation of a tangible interest. Artifices designed to cause losses of an intangible nature also violate the statute. *See e.g., United States v. Bohonus, supra* (loss of right to honest services); *United States v. Condolon,* 600 F.2d 7, 9 (4th Cir. 1979) (loss of time, effort, and expectations); *United States v. Louderman,* 576 F.2d 1383 (9th Cir.), *cert. denied,* 439 U.S. 896 (1978) (deprivation of right to privacy). These precedents aid us to focus our inquiry. Recognizing that § 1341 reaches some schemes causing intangible loss, we must determine whether "mail fraud" encompasses all fraudulent schemes in-

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[14]Thus, to make out a mail fraud violation, the Government must show that the scheme was devised with the specific intent to defraud, *e.g., United States v. Keane,* 552 F.2d 534, 544 (7th Cir. 1975), *cert. denied,* 424 U.S. 976 (1976). This specific intent requirement is sometimes used to distinguish actual and constructive fraud. Actual frauds are intentional frauds. Constructive frauds involve breaches of fiduciary or equitable duties where an intent to deceive is lacking. *See Epstein v. United States,* 174 F.2d 754, 765-66 (6th Cir. 1949). Only actual frauds are within the purview of the mail fraud statute. *Post v. United States,* 407 F.2d 319, 329 & n. 58 (D.C. Cir. 1968), *cert. denied,* 393 U.S. 1092 (1969); *Epstein v. United States, supra.*

To prove mail fraud, the prosecution must also demonstrate that the use of the mails in furtherance of the scheme was reasonably foreseeable, e.g., *Pereira v. United States,* 347 U.S. 1, 8-9 (1954). Furthermore, the deceit must have gone to the nature of the bargain, *United States v. Regent Office Supply Co.,* 421 F.2d 1174, 1182 (2d Cir. 1970); that is, any nondisclosures or affirmative misrepresentations must have been material, *see, e.g., United States v. Bush,* 522 F.2d 641, 647-48 (7th Cir. 1975), *cert denied,* 424 U.S. 977 (1976); *United States v. Bryza,* 522 F.2d 414, 425-26 (7th Cir. 1975), *cert. denied,* 426 U.S. 912 (1976). And although the Government need not show that the scheme's victims were in fact defrauded, *United States v. Andreadis,* 366 F.2nd 423, 431 (2d Cir. 1966), *cert. denied,* 385 U.S. 1001 (1967), the prosecution must prove that some actual harm or injury was at least contemplated, *United States v. Dixon,* 536 F.2d 1388, 1399 n. 11 (2d Cir. 1976); *United States v. Regent Office Supply Co., supra,* 421 F.2d at 1180.

volving an employer's deprivation of his right to his employee's loval and honest services.

Despite the broad language contained in some opinions, *see, e.g., United States v. Condolon, supra,* several courts have held that the breach of an employee's fiduciary duty, without more, does not violate the mail fraud statute. *See United States v. Mandel, supra,* 591 F.2d at 1362; *United States v. McDonald,* 576 F.2d 1350, 1359 n.14 (9th Cir.), *cert. denied,* 439 U.S. 830 and 439 U.S. 927 (1978); *United States v. Bush,* 522 F.2d 641, 648 (7th Cir. 1975), *cert. denied,* 424 U.S. 977 (1976). The additional element which frequently transforms a mere fiduciary breach into a criminal offense is a violation of the employee's duty to disclose material information to his employer. In *United States v. Bush,* for example, Mayor Daley's former press secretary was prosecuted for concealing his interest in a firm that held the exclusive rights to prepare advertising displays at Chicago O'Hare International Airport. In affirming Bush's mail fraud conviction, the Seventh Circuit noted he had breached his fiduciary duty to render honest and faithful services to the Mayor and citizens of Chicago. But this breach alone, the Court reasoned, could never be considered a mail fraud violation. "It is only when [Bush's] failure to provide honest and faithful services is combined with his material misrepresentations to the mayor . . . and his active concealment that an illegal fraud occurs which is cognizable under § 1341." 522 F.2d at 648.

Similarly in *United States v. Rabbitt,* 583 F.2d 1014 (8th Cir. 1978), *cert. denied,* 439 U.S. 1116 (1979), the Eighth Circuit reversed the mail fraud conviction of a state legislator who aided an architectural firm in obtaining state contracts. Rabbitt's reward for his services was a commission of ten percent based on the work he diverted to the firm. Although Rabbitt violated the canons of legal ethics, a statute requiring candidates for state office to disclose their sources of income, and possibly a state provision outlawing "partiality" or abuse of public office, his unscrupulous conduct was held not to violate § 1341. Significantly, one reason for the court's refusal to impose criminal

liability was that Rabbitt, as a state official, was under no affirmative duty to disclose his interest in the firm.[15]

Our discussion is not to be construed as holding that an employee's duty to disclose material information to his employer must be imposed by state or federal statute. Indeed, the employment relationship, by itself, may oblige an employee not to conceal, and in fact to reveal, information he has reason to believe is material to the conduct of his employer's business. *See United States v. Brown,* 540 F.2d 364 (8th Cir. 1976); *United States v. Groves,* 122 F.2d 87 (2d Cir.), *cert. denied,* 314 U.S. 670 (1941).

In light of these precedents, and taking the facts as alleged by the Government, we have no difficulty holding that Von Barta was under a duty to apprise Andrus of material information concerning Piwacket's trading in government bonds. Von Barta was admonished to warn Mr. Andrus if the firm's repurchase agreements "were in trouble." But he said nothing upon opening an account for an allegedly undercapitalized firm, knowing, as an experienced trader for Andrus, that if Piwacket became insolvent, Andrus would be liable for any losses. Nor can we overlook the fact that by trading in million of dollars, Von Barta exposed Andrus to liabilities greatly in excess of Andrus's limited ability to meet them. When Mr. Andrus became concerned, however, and inquired about Piwacket, Von Barta dissimulated, telling his employer that Piwacket was backed by credit worthy arbitrageurs from Long Island. Von Barta's alleged scheme to speculate in the bond market using Andrus's credit was eminently successful. At first, Von Barta pocketed nearly $100,000 from Piwacket's trades, but when the market collapsed, Andrus was left with nothing but a responsibility for heavy debts.

The Government's charges reveal that Von Barta's relationship with Andrus was special in several respects. Von Barta was

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[15] *Accord, United States v. Groves,* 122 F.2d 87, 90 (2d Cir.), *cert. denied,* 314 U.S. 670 (1941) (breach of corporate insider's positive duty to speak is violation of mail fraud statute). *See also United States v. Brown,* 540 F.2d 364, 374-75 (8th Cir. 1976); *United States v. Bryza, supra,* 522 F.2d at 425-26.

advised to keep his employer informed of adverse market developments, and he occupied a position of great trust and considerable power, apparently possessing the authority to extend his employer's credit beyond Andrus's capacity to cover losses. These special circumstances are the source of Von Barta's duty of disclosure. Thus, we need not decide whether all employees risk prosecution for mail fraud if they fail to reveal material information to their employers. Nor must we express any opinion as to what constitutes material information. We simply hold that on the facts alleged by the Government, Von Barta's breach of his duty of disclosure subjects him to prosecution for mail fraud.

Accordingly, we reverse the district court's order dismissing the indictment, and remand for further proceedings not inconsistent with this opinion.

## Second Opinion of the District Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

79 Cr. 774-CLB

MEMORANDUM AND ORDER
[Reargument]

UNITED STATES OF AMERICA,

—*v*—

JOHN VON BARTA,

*Defendant.*

*Brieant, J.*

By motion docketed April 30, 1980, the Government seeks reargument on this Court's memorandum and order of April 21, 1980, which denied defendant Von Barta's motion to dismiss the indictment, but also limited the Government's theory of mail and wire fraud in this case. The motion to reargue is granted, and this Court adheres to its original decision, with these clarifications.

The decision of this Court dated April 21st held that the Government could not proceed at trial on the theory that the *object* of defendant's alleged scheme to defraud was to deprive his employer, Malon S. Andrus, Inc., or his associate Harty's employer Blyth Eastman Dillon, Inc. of the duty of honesty and loyalty owed these respective employers by their employee-agents. The rationale for this decision was that the mail and wire fraud statutes are *not* violated simply because an employee deceives his employer, thereby breaching his fiduciary duty, in contemplation of depriving his employer of an *intangible* right or interest, such as the right to receive honest and loyal services of the actor or his criminal associate.

*Second Opinion of the District Court*

However, this indictment was not dismissed, because the Government also alleged a scheme by defendant and Harty to induce Andrus, Blyth, or others, by fraud, to part with money, securities or other tangibles. Specifically, the indictment may be read to allege active concealment and false declarations of fact by defendant, which were intended to and did cause Andrus, Blyth and others to enter into purchases and sales of securities which they would not otherwise have accepted or performed. Our prior decision holds, in effect, that if the Government proves at trial that defendant directly or through Harty so deceived or defrauded Andrus or Blyth, and that defendant contemplated some actual harm or pecuniary injury to either of them from such conduct, then the Government would have established a *prima facie* case under the wire and mail fraud statutes.

The Government contends that this conclusion is erroneous. It has been granted reargument, and now urges that it be allowed to proceed on a theory ". . . that the breach of an employee's fiduciary duties to his employer—e.g., loyalty, honesty, good faith, . . . and the like—when coupled with concealments, nondisclosures and falsehoods of whatever nature, that are designed and intended for the employee's gain, constitute a scheme to defraud under the mail and wire fraud statutes, regardless of whether the employer suffers a tangible loss, since the intangible loss arising from the employee's fiduciary breach is sufficient under these anti-fraud statutes." Government's Memorandum of Law dated April 30, 1980, pp. 10-11.

This Court agrees that a scheme by an employee to use his private fiduciary position to obtain direct pecuniary gain by fraud is within the mail and wire fraud statutes. This principle is well established in *United States v. Dixon,* 536 F.2d 1388 (2d Cir. 1976), and the cases cited therein. This Court also agrees that the Government need not prove that the employer suffered any tangible loss from this breach of fiduciary duty by the employee; the anti-fraud statutes only require a "scheme to defraud" and not actual consummated fraud. *United States v. Dixon, supra,* at 1399, n. 11. However, the Government also has the burden of proving that some actual tangible harm or

injury was "contemplated" by the employee when he breached his fiduciary duty. *United States v. Regent Office Supply Co.*, 421 F.2d 1174 (2d Cir. 1970); *United States v. Dixon, supra,* at 1399, n. 11. Here lies the crux of the dispute. Apparently, the Government would like to proceed on the theory that if defendant contemplated some intangible harm to Andrus and Blyth, such as the deprivation of his or Harty's duty of honesty and loyalty to those firms, and then proceeded to breach his fiduciary duty and make material misstatements to obtain direct pecuniary gain, defendant has violated the mail and wire fraud statutes. In the alternative, the Government could assert that it will prove that defendant contemplated actual pecuniary injury to Andrus, Blyth and others, as well as pecuniary benefits to himself, when he failed to disclose material information and made material misstatements. This Court believes that the latter, alternative theory proposed by the Government would be the only one available to it, for reasons set forth in the April 21st decision. Nor is this the case to expand the anti-fraud statutes to include schemes which have as their *object* the deprivation of intangible rights and interests. Such a theory evolved to prosecute public officials, usually as a practical matter, not subject to state prosecution, who were engaging in schemes which did not deprive the public of tangible interests, but rather deprived it of its right of the services of an honest, loyal official properly performing his official duties. *United States* v. *Mandel,* 591 F.2d 1347 (4th Cir. 1979).

In this case, if the Government cannot prove that defendant and Harty's scheme contemplated that Andrus, Blyth and others would lose tangible interests, it was directed to advise the Court to that effect, and the motion to dismiss would be granted. This direction was made on reargument.

Thereafter, under date of May 8, 1980, the Government has advised the Court, with copy to opposing counsel, that

> "the Government will proceed to trial in this case *only* pursuant to the legal theory under which the present Indictment was returned by the Grand Jury, namely, that

> the defendant Von Barta, and his co-schemer Harty, 'violated and caused each other to violate the duties of honesty and loyalty which they owed to their respective employers' (Indictment, ¶ 6)—breached their fiduciary duties—*and that such conduct,* either standing alone or taken with other false statements, concealments and non-disclosures, *caused the victims of the defendant's scheme to suffer both tangible and intangible losses.*"

It appears clearly to this Court from the above submission that, as anticipated by the Court, the Government declines to go to trial on this matter on the only viable theory available to it under the Indictment, as more fully discussed in our prior memorandum decision dated April 21, 1980 at p. 9. Accordingly, the motion to dismiss should be granted. Defendant meets this development by advising this Court through his attorney that:

> "In response to Mr. Kaplan's letter of May 8, 1980 in connection with the above-referred case, we wish to reiterate our position that the defendant stands ready for trial.
> Since Your Honor has denied our Motion to Dismiss because of your stated finding that the Indictment is sufficient on its face, any confession by the government that it lacks the evidence to proceed, or prefers not to proceed for any reason at this point, in light of all the prior proceedings, must be deemed to constitute a request by the government for a dismissal of this indictment. As such the defendant wishes to reemphasize his opposition to the government's motion."

The Court rejects defendant's position. It was the defendant who, probably analyzing the Indictment and particulars correctly and exactly, as it turns out, the way the Government intended, who moved for an order of dismissal. In denying the defendant's motion, the Court recognized that there was an alternate rationale by which under what it has pleaded and represents it can prove, the Government could obtain a conviction. Our

April 21, 1980 opinion observed that (p. 9) "This rationale was not urged at oral argument by the Government. Should it indicate that it does not intend to go to the trial jury on that analysis, or cannot prove a *prima facie* case on that basis the Court will grant a pre-trial motion to dismiss if so requested." Had the Government's letter of May 8, 1980 been before the Court when defendant's motion was heard, the Court would have granted defendant's motion to dismiss. Now that the matter has in effect been clarified, defendant seeks to have his motion regarded as withdrawn or denied. There is no basis to do so. Defendant made the motion and it should be resolved on the merits. To allow its withdrawal, now that the Court's view on a controversial point of law has been elicited in advance of trial, would be to permit defendant to violate the traditional view that a party should be estopped to "blow hot and cold in a lawsuit." See, Beck, Walter, *Estoppel Against Inconsistent Positions in Judicial Proceedings*, 9 Bklyn Law Review 245, 248 (1940):

> "The gravamen of this type of estoppel, therefore, is not reliance by the other party to his resultant detriment, but rather in having deliberately taken a legal position, from which the courts will not permit one to recede, for purposes of convenience. It is clearly a rule born of the necessity of orderly administration of our judicial system."

Defendant's application to withdraw his motion to dismiss is denied. Upon the amplification contemplated by the Court's prior memorandum decision of April 21, 1980, and upon reargument, the prior decision of the Court, as herein amplified and explained, is adhered to and defendant's motion to dismiss the Indictment is granted.

So Ordered.

Dated: New York, New York
May 12, 1980

CHARLES L. BRIEANT
U. S. D. J.

## First Opinion of the District Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

79 Cr. 774-CLB

*MEMORANDUM AND ORDER*

UNITED STATES OF AMERICA,

—*v*—

JOHN VON BARTA,

*Defendant.*

*Brieant, J.*

Defendant John Von Barta moves pursuant to Rule 12(b), F.R.Crim.P., for an order dismissing the indictment filed on November 1, 1979, which charges him with mail fraud, 18 U.S.C. §§ 1341 and 2, wire fraud, 18 U.S.C. §§ 1343 and 2, and conspiracy to engage therein. The motion was heard on January 31, 1980, and fully submitted on February 15, 1980.

The following facts are assumed solely for the motion: Defendant was employed from 1976 to 1979 as a salesman and trader of government bonds at Malon S. Andrus, Inc. ("Andrus"), a small securities firm in New York City. As part of his employment, defendant entered into transactions for his employer, and for his employer's customers with, Blyth Eastman Dillon, Inc. ("Blyth"), a large brokerage firm. In doing so, he dealt with a William Harty, who was employed as a salesman in Blyth's government securities department.

In or about July 1978, Harty formed a New York corporation, Piwacket Corp. ("Piwacket"), through which he could personally trade in government bonds. Defendant contributed $5,000 in money to Piwacket, which thus had total funds of $10,000, and Harty agreed to share any profits from the cor-

poration equally with Von Barta. In August 1978, defendant arranged to have an account opened at Andrus in Piwacket's name, and he and Harty began to trade in government and government agency bonds under the Piwacket name. Often, these trades took place through Blyth, with Andrus acting as agent for Piwacket. There is some dispute over the nature of these trades. Defendant alleges that Piwacket engaged in three forms of legitimate trading: (1) straight purchases and sales; (2) straight repurchasing agreements and straight reverse repurchasing agreements; and (3) arbitrages. The Government disagrees, stating that defendant and Harty in effect were speculating in the government bond market by using the credit of their respective employers, with no personal risks to themselves, and were obtaining such credit fraudulently by using Piwacket as a customer, without disclosing their own participation therein.

There is also some dispute concerning whether defendant made or caused to be made misstatements, nondisclosures and concealment, in respect to Andrus, concerning Picwaket's financial status and defendant's role therein. Defendant alleges that he needed no authorization to open an account at Andrus for Piwacket, and while he concedes that he never disclosed his interest in Piwacket and the creditworthiness of Piwacket or its lack thereof, he states that such disclosure was not required by any in-house rule at either Blyth or Andrus. He also states that Andrus was aware of the Piwacket account, but that no special inquiry was made by either Andrus or Blyth concerning Piwacket's stability or the identity of its principals. On the other hand, the Government alleges that defendant misrepresented to Andrus that Piwacket was an established, creditworthy arbitrageur, and claims that Andrus would never have permitted Piwacket to open an account, or trade from such an account, if Andrus had known: (1) that Piwacket's assets totalled only $10,000; (2) that Piwacket was trading in sums that exceeded even Andrus' assets; and (3) that defendant was entitled to half of Piwacket's profits because of his contribution or advance of $5,000. The Government also contends that defendant had a duty to disclose his personal interest in Piwacket as well as other relevant information, to Andrus, because he was advised, at

the beginning of his employment, that he should "never jeopardize the firm's banking relationships and [should] always advise Mr. Andrus if the firm's repurchase agreements 'were in trouble'." [Letter dated February 7, 1980 from Assistant United States Attorney Eugene Neal Kaplan to Elkan Abramowitz, counsel for defendant]. Finally, the Government claims that when defendant was questioned by Blyth about Piwacket, he concealed or denied knowledge about the company, and stated falsely that Harty was the sole principal.

In any event, these trades by Piwacket initially were successful, and defendant and Harty realized profits of approximately $200,000, which they shared equally. However, between December 1978 and June 1979, adverse trends in rates of interest and market conditions caused Piwacket to suffer loses of nearly Two Million Dollars. Because of Piwacket's insolvency, Andrus, Blyth and others were damaged.

The indictment charges that defendant and Harty ". . . failed to disclose to Andrus, Blyth and other firms a number of material facts regarding the trading in which they were covertly engaged, and violated and caused each other to violate the duties of honesty and loyalty which they owed to their respective employers." This permitted defendant and Harty to speculate in the government bond market without the risk of any loss. "As a result of this scheme and artifice to defraud, Andrus, Blyth and other firms suffered losses of nearly $2,000,000."

Defendant claims that the indictment against him must be dismissed because it fails to allege a "scheme or artifice to defraud," which is a necessary element to each count in the indictment for mail fraud, wire fraud, and conspiracy to commit such fraud. Specifically, defendant alleges that defendant and Harty had no affirmative duty to disclose either to Andrus or Blyth, their personal interest in Piwacket or the fact that Piwacket had relatively minimal assets. In addition, defendant claims that any nondisclosures or misstatements in this case are immaterial, as they could not affect the course of business between Piwacket and Andrus or Blyth in a material fashion. The

Government replies that defendant and Harty breached their respective fiduciary duties to Andrus and Blyth, and that this breach, when coupled with their concealment and nondisclosure of material information concerning Piwacket, constitutes a scheme or artifice to defraud under the relevant statutes.

Thus, the issue in this case is whether the plan of defendant and Harty to trade in government bonds through Piwacket for their own personal benefit, and their statements and nondisclosures in connection with this plan, could be found by a trial jury, beyond a reasonable doubt, to constitute a scheme or artifice to defraud, in violation of 18 U.S.C. §§ 1341 and 1343.

We begin first with the difficult question of whether this point may be raised by pre-trial motion. The indictment on its face clearly charges all necessary elements of a crime over which this Court has jurisdiction. We treat the balance of the Government's submissions as in the nature of a Bill of Particulars, both amplifying and limiting the indictment. There is no counterpart found in the Federal Rules of Criminal Procedure which extends to criminal cases, any procedure similar to summary judgment practice under Rule 56, F.R.Civ.P. in civil cases, whereby a complaint which states a good claim on its face, may be dismissed on the merits by a decision of the Court rendered on arguments, documents or affidavits. Counsel for Von Barta has suggested in argument that his client would be spared the "agony of a trial" if his motion is granted. But he will also be denied the ecstasy of a double jeopardy claim should it later be held that a favorable resolution of his pre-trial motion was incorrect or unjustified. Notwithstanding the absence of any summary judgment procedure in the rules with respect to criminal cases, the practice apparently is not unheard of. In *United States v. Valazquez,* 490 F.2d 29 (2d Cir. 1973) the district court dismissed an indictment solely on motion papers and in doing so, went beyond the face of the indictment to consider competent exculpatory evidence contained in a public file. The Court of Appeals held that the order was appealable, reversed on the merits and ordered a trial. Similar procedure was followed in *Serfass v. United States,* 420 U.S. 377 (1973). That

these cases in which criminal prosecutions were terminated in advance of trial based solely on documents or affidavits usually involve Selective Service violations (in which the contents or lack thereof of official files may preclude conviction) seems to be of no theoretical significance. The procedure seems permissible, although it should be used sparingly. The Court treats the case as a motion to dismiss on the face of the indictment, as amplified and limited by letters from the Government, oral representations made in open court, and silence or partial silence of the Government in response to defendant's submissions. No proof has been taken. We now turn to the merits of the contentions here.

A number of cases have taught that there are generally two types of schemes to defraud prosecuted under the mail and wire fraud statutes. The first type comprises schemes to defraud an individual of money or other tangible interests. The second comprises schemes which have as their object the deprivation of intangible rights or interests. See, *e.g., United States v. McNeive,* 536 F.2d 1245 (8th Cir. 1976); *United States v. Bush,* 522 F.2d 641 (7th Cir. 1975), *cert. denied,* 424 U.S. 977 (1976). Under the second type of scheme, a number of circuits other than our own have recognized that an employee deprives his employer of an intangible right or interest if the employee merely breaches his duty of honesty and loyalty to that employer, and then takes some affirmative action to conceal, or prevent disclosure of, material information concerning that breach. See, *United States v. McNeive, supra; United States v. Bush, supra; United States v. George,* 477 F.2d 508 (7th Cir.), *cert. denied* 414 U.S. 977 (1976). The Second Circuit has not passed on this theory, and expressly left open the validity of a similar theory based on bribery in private enterprise. See, *United States v. Dixon,* 536 F.2d 1388 (2d Cir. 1976).

The Government in this case asks this Court to adopt the above theory. It proposes to go to the jury upon a theory showing that defendant and Harty, by their scheme to trade secretly through Piwacket, were "defrauding" Andrus and Blyth of their intangible right to have the benefit of the services of honest and

loyal employees. Clearly, the indictment and supporting evidence particularized by the Government supports a conclusion that defendant and Harty breached their respective duties of honesty and loyalty to Andrus and Blyth. It charges that they used their positions at these firms to their own personal advantage by secretly trading in bonds for their own account through Piwacket in amounts and on risks that far exceeded their available assets. A trial jury may find that such conduct would not be permitted by any employer having full knowledge of the facts. See, *United States v. George, supra.*

As noted above, an agent's breach of his fiduciary duty presented under such a theory must be coupled with some affirmative action by the agent or employee to defraud his principal, or employer, in order to convict under the mail and wire fraud statutes. The indictment charges that defendant and Harty "failed to disclose a number of material facts regarding the trading in which they were covertly engaged." In its papers opposing the instant motion, the Government is more specific, alleging that defendant affirmatively misrepresented to Andrus that Piwacket was an "established arbitrageur," which presumably put to rest any further inquiry by Andrus into Piwacket's assets or its creditworthiness. The Government also claims that defendant expressly denied any participation in Piwacket when questioned by Blyth, which, if proved, could be considered to be active concealment of his role in the affairs of Piwacket.

Defendant contends that even if these statements were made by defendant, they were not "material." The Government alleges that the head of the Andrus firm, acting reasonably, would never have permitted Piwacket to open or continue to have an account had he known of defendant's role in Piwacket, Harty's participation therein, and its limited assets. Clearly, defendant's misstatements, if they were made, could be found to be material. See, *TSC Industries, Inc. v. Northway,* 426 U.S. 438 (1976). Therefore, if we accept the theory set forth by a number of other circuits, such facts proved under the indictment here would set forth a scheme or artifice to defraud under §§ 1341 and 1343.

Absent controlling precedent in this Circuit, this Court declines to accept the Government's proposed theory and extend the wide mouthed purse seine of "mail fraud" to include mere breaches of a fiduciary duty of honesty and loyalty by an employee, coupled with material misstatements of fact or nondisclosure. The original purpose of such a theory, that a scheme to defraud may include deprivation of such intangible rights and interests, was to extend the mail fraud statute to public officials who used their fiduciary positions for improper purposes. See, *United States v. McNeive, supra; United States v. Bush, supra.* Those courts reasoned that while the public was not deprived of any tangible property if, for example, one of its officials accepted a bribe or withheld material information for his own benefit, the public was certainly deprived of its right to the loyal and honest service of a person on the public payroll.

The same rationale does not necessarily apply to employees of private organizations, and such a further enlargement of the thrust of this already broadened statute had best be left to the Congress, absent contrary direction from the Supreme Court or our Court of Appeals.

However, this view of the Court does not justify or require dismissal of this indictment against Von Barta. The Government also claims that it has evidence to show that there was active concealment and false declarations of fact on the part of defendant to Andrus and Blyth, with a resulting loss of Two Million Dollars to those firms. If proof at trial shows that defendant, alone or with Harty, intentionally induced Blyth or Andrus to part with money or tangible property, *e.g.*, to sell or buy securities of the United States on credit to or for Piwacket, and did so by means of active concealment or false statements in furtherance of a scheme or artifice to defraud, within the statute, and some pecuniary loss to the firms or pecuniary gain to Harty or to defendant was sought or intended thereby, then defendant could be convicted under the within indictment. See, *United States v. Regent Office Supply Co.*, 421 F.2d 1174 (2d Cir. 1970). This rationale was not urged at oral argument by the Government. Should it indicate that it

does not intend to go to the trial jury on that analysis, or cannot prove a *prima facie* case on that basis, this Court will grant a pre-trial motion to dismiss if so requested.

The Court is prepared to leave to the jury at trial the question of whether any such false declarations were uttered, and if so, whether they were material in the sense that an organization such as Andrus or Blyth would reasonably rely thereon and in fact did so. The Court's instructions will remove from the jury's consideration any contentions of guilt based solely on silence coupled with a breach of fiduciary duty.

This is not the time or place to formulate detailed jury instructions. Counsel for the Government and defendant may submit their proposed requests, and should do so at their earliest convenient opportunity. They may supplement the same at any time prior to the charge conference pursuant to Rule 30, F.R. Crim.P.

Finding on its papers before me, treated as in the nature of a Bill of Particulars, that the Government may well prove a *prima facie* case based on material misrepresentations concerning Piwacket, and resulting monetary loss on bond trades, to Andrus and Blyth, and gain to Harty or defendant, the motion to dismiss the indictment is denied.

Ordinarily, it would seem appropriate merely to deny the motion without the further elaboration present here. However, due to the complexity of the alleged scheme to defraud, and this Court's decision not to submit to the jury consideration of deprivation of defendant's fiduciary duty as an object of the scheme, it seems desirable to resolve the issue at this stage. Thus the parties and counsel will be alerted prior to trial concerning the nature and extent of the rulings which the Court will make.

If the Government's proof at trial fails to show beyond a reasonable doubt that Von Barta knowingly and wilfully made false statements of material facts concerning Piwacket to Andrus and Blyth, or otherwise actively concealed material information con-

cerning it; or alternatively fails to show that Von Barta knowingly and wilfully caused or aided and abetted Harty to utter such falsehoods or conceal such information, then when the Government rests its case, Von Barta should be entitled to prevail upon his motion for a judgment of acquittal pursuant to Rule 29(a), F.R.Crim.P.

Defendant and counsel shall appear before me on May 6, 1980 at 9:30 A.M. in Courtroom 618 for the purpose of setting a trial date.

So Ordered

Dated: New York, New York
April 21, 1980

CHARLES L. BRIEANT
U. S. D. J.

## Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS
for the
SECOND CIRCUIT
80-1233

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-fifth day of November, one thousand nine hundred and eighty.

Present: HON. IRVING R. KAUFMAN
HON. AMALYA L. KEARSE
HON. MYRON H. BRIGHT
Circuit Judges,

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UNITED STATES OF AMERICA,
*Plaintiff-Appellant,*

*vs*

JOHN VON BARTA,
*Defendant-Appellee.*

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APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed and the action be and it hereby is remanded to the said district court for further proceedings not inconsistent with this opinion.

A. DANIEL FUSARO
Clerk
EDWARD J. GUARDARO
Deputy Clerk

**Excerpts from Transcript of District Court Proceeding on May 6, 1980**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

79 Cr. 774 (CLB)

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UNITED STATES OF AMERICA,

*v.*

JOHN VON BARTA,

*Defendant.*

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Before: HON. CHARLES L. BRIEANT,
District Judge

New York, N.Y.
May 6, 1980 — 9:40 A.M.

APPEARANCES:

WILLIAM M. TENDY, ESQ.,
United States Attorney for the
Southern District of New York

BY: EUGENE NEAL KAPLAN, ESQ., and
RONDA BROWN, ESQ.,
Assistant United States Attorneys

OBERMAIER, MORVILLO, ABRAMOWITZ & FITZPATRICK, P.C.,
Attorneys for Defendant

BY: ELKAN ABRAMOWITZ, ESQ., and
GILDA I. MARIANI, ESQ.,
of Counsel

* * * * * * *

*Excerpts from Transcripts of District Court Proceedings on May 6, 1980*

Your pleadings are perfectly good, your indictment is good on its face, your bill of particulars, or the various papers and representations orally to the Court which the Court has treated together as constituting a bill of particulars, are to the effect that they fraudulently deprived these stock houses of certain face amount of bonds sold on credit, to the extent of $2 million.

It is quite clear to me that by using the mails and wires I contact a brokerage house and make a false, material statement to them, and I am a big butter-and-egg man from New Jersey and not just an impoverished district judge, I buy $2 million worth of bonds on credit and the object of my scheme is to get them to sell me $2 million worth of bonds, which they would never have sold, to me that is mail fraud.

I don't see any problem with that kind of a case and if the government proved all of those elements beyond a reasonable doubt, I think you would be entitled to a conviction, and I think you can prove that under the representations you have made to the Court in this case, but it is not clear to me whether you are sailing off on a different tangent and saying they had a scheme to deprive the employers of the undivided loyalty of the agent, something of the nature of an intangible, and if that were all you had, I would be inclined to dismiss it.

If you tell me today that that is all you had, I will straighten out some of the minor errata in the decision which the Court filed and grant the motion, but it seems to me that you also are alleging a scheme to deprive the brokerage houses of tangible property, namely, U.S. bonds.

MR. KAPLAN: That is true, but the problem I have with your Honor's decision is whether there is a causal relationship between the false statements and concealments if you take out the fiduciary nature of the relationship between Mr. Von Barta and his employer—

THE COURT: If I go into a brokerage house, by wire or mail, and I tell the brokerage house that I am a reknowned ar-

bitrageur from Long Island, which is one of the false representations made here, and they reasonably relying on that sell me bonds on credit, isn't that mail fraud?

MR. KAPLAN: I would think so.

THE COURT: Wholly apart from the fact that I am an employee. The fact that this fellow was an employee may bear on this scienter and his intentions and may show that he had knowledge that the representation was relevant and material and would be so regarded by the seller of the securities.

If that is what you have, I think you can go to the jury on that theory, but I would dismiss at the close of the government's case if the proof showed they had a scheme by wire fraud or mail fraud to deprive the non-public employer of the right to the undivided loyalty of its agent.

MR. KAPLAN: I think the problem the government has with your Honor's decision is that we believe the law entitles us to go to the jury on the theory that your Honor has said we cannot go to the jury on.

THE COURT: If that is your belief, I will grant the motion and you can take it up with higher authority.

Based on your bill of particulars, your pleadings, your indictment, it seems to me you can go on the ordinary mail and wire fraud theory and really my intention at that hearing was to find out because the papers which the government submitted do not require the Court to focus on the issue which both you and Mr. Abramowitz have focused on and which you are now pointing toward.

I can't tell you what theory to try the case on, but if you try it on the theory you seem to be relying on, when the government rests there will be a motion for a judgment of acquittal under Rule 29A and I can't tell you how to distort or change your theory.

*Excerpts from Transcripts of District Court Proceedings on May 6, 1980*

The evidence you have given me justifies proceeding on both theories.

MR. KAPLAN: That is correct, and we would like to proceed on both theories but your Honor has limited us to the one theory.

THE COURT: If you tell me you cannot proceed on the one theory, I will commend your candor and dismiss the indictment.

MR. KAPLAN: I might well do that, although I won't be prepared to do that this morning, but perhaps within the next day or so and as soon as I have had a chance to focus on where we are and what my proof is.

THE COURT: Mr. Abramowitz knows better than you that you cannot dismiss an indictment which is valid on its face and when you take that indictment and amplify it with a bill of particulars, which you have done, or which I have permitted you to do, although you don't have a formal bill of particulars and I am treating your exchanges of letters and your oral representations on the hearing on the motion as being in the nature of a bill of particulars, . . .

* * * * * *

THE COURT: My present thinking is that if Mr. Kaplan advises the Court that he wants to go to trial only on the theory of a scheme to defraud the employers of the intangible right to the loyal services of their agents and employees—do I state it correctly?

MR. KAPLAN: Yes.

THE COURT: Is that what you are talking going to trial on?

MR. KAPLAN: Yes.

THE COURT: If you make the statement that that is your sole intention today, I will write a very brief memorandum, as

anticipated on page 10 of the prior memorandum, and I will dismiss the indictment, and you can tell me that in a one-line letter.

If you evince a desire to go to trial on the theory that they defrauded by false and deceitful representations one or both of these stock houses out of the possession of bonds or money, or both, that is the theory you will go to trial on, but I am not compelling the government to go to trial on a theory it doesn't elect to go to trial on.